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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF NEW JERSEY,

Petitioner,

vs.

LINDA DELUCA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

After respondent's trial for death by auto, the complaint charging her with driving while intoxicated was dismissed premised upon her double jeopardy claim arising under the United States Constitution. However, on certification, the New Jersey Supreme Court reversed and remanded, reasoning that respondent's claim must fail under the traditional double jeopardy analysis of *Blockburger v. United States*, 284 U.S. 299 (1932), but will succeed under the enhanced protection of *Illinois v. Vitale*, 447 U.S. 410 (1980), if it is determined upon remand that the sole evidence of recklessness adduced at the first trial was respondent's intoxication.

The question presented for review is:

Does *Illinois v. Vitale* afford greater protection against double jeopardy than *Blockburger v. United States*, so as to require a remand for a hearing to examine the nature of the proofs adduced at the first trial?

PARTIES BELOW

All parties below are parties to this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ———

STATE OF NEW JERSEY,

Petitioner,

vs.

LINDA DELUCA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in the above-entitled proceeding on July 21, 1987.

OPINIONS BELOW

The written opinion of the Municipal Court, Dover Township, New Jersey (Russo, J.M.C.), has not been reported. It is reprinted as Appendix B, p. 16a, *infra*.

The written opinion of the Superior Court, Law Division (Giovine, J.S.C.), has not been reported. It is reprinted as Appendix C, p. 23a, *infra*.

The written opinion of the Superior Court, Appellate Division (Michels, P.J.A.D.), is reported at 208

N.J. Super. 422, 506 A.2d 55 (App. Div. 1986), and is reprinted as Appendix E, p. 27a, *infra.*

The written opinion of the Supreme Court of New Jersey is reported at 108 N.J. 98, 527 A.2d 1355 (1987), and is reprinted as Appendix A, p. 1a, *infra.*

JURISDICTION

On July 21, 1987, the Supreme Court of New Jersey in its opinion to which *certiorari* is sought interpreted the double jeopardy clause of the fifth amendment to the United States Constitution. The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is invoked under 28 U.S.C. sec. 1257(3).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED[1]

NEW JERSEY STATUTES ANNOTATED sec. 2C:11-5
(West 1982 & Supp. 1984)

2C:11-5. Death by auto

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[1] For the convenience of this Court, the statutory language in

a. Criminal homicide constitutes death by auto when it is caused by driving a vehicle recklessly.

b. Death by auto is a crime of the fourth degree and notwithstanding the provisions of 2C:43-2, the court may not suspend the imposition of sentence on any defendant convicted under this section who was operating the vehicle under the influence of an intoxicating liquor, narcotic, hallucinogenic or habit-producing drug and any sentence imposed under this section shall include either a fixed minimum term of 120 days imprisonment during which the defendant shall be ineligible for parole or a requirement that the defendant perform a community related service for a minimum of 120 days.

c. For good cause shown the court may, in accepting a plea of guilty under this section, order that such plea not be evidential in any civil proceeding.

NEW JERSEY STATUTES ANNOTATED sec. 39:4-50(a)
(West 1973 & Supp. 1984)

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery

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effect on January 29, 1984, the pertinent date herein, has been reproduced in this section. Both statutes involved have been subsequently amended with respect to sentencing; the amendments are not relevant to the present matter.

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject, for the first offense, to a fine of not less than $250.00 nor more than $400.00 or imprisonment for a term of not more than 30 days or both, in the discretion of the court, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than one year. Except as hereinafter provided, for a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances or may be sentenced to imprisonment for a term of not more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he

may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director, consistent with subsection (b) of this section. Except as hereinafter provided for a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, or to an inpatient rehabilitation program approved by the Director of the Division of Motor Vehicles.

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender

> in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

STATEMENT OF THE CASE

This case squarely presents the double jeopardy issue that Chief Justice Rehnquist (then Justice Rehnquist), Justice O'Connor and Justice Powell believed should have been addressed in *Thigpen v. Roberts*, 468 U.S. 27 (1984). *Id.* at 33 (Rehnquist, J., dissenting), 40 (O'Connor, J., dissenting). On July 21, 1987, the Supreme Court of New Jersey determined that *Illinois v. Vitale*, 447 U.S. 410 (1980), created an alternative test, independent of the analysis set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), for ascertaining whether one offense is the same as another for federal double jeopardy purposes. According to the state supreme court, application of this alternative test to the case before it would bar, on double jeopardy grounds, a prosecution for driving while intoxicated (DWI) under N.J. Stat. Ann. sec. 39:4-50(a) after an acquittal of death by auto under N.J. Stat. Ann. sec. 2C:11-5 "[i]f the State relied solely on intoxication as evidence of recklessness in the death-by-auto case. . . ." (App. A, at p. 11a). The Court acknowledged that this alternative test deviated

from the traditional *Blockburger* test, which focused exclusively upon the elements of the respective offenses, and under which "drunk driving and death by auto are not the same offense" because each requires proof of an element not required by the other. (App. A, at pp. 10a-11a). This federal issue was raised and resolved at every level of litigation in the state courts.

On January 29, 1984, at approximately 1:00 a.m., respondent was involved in a motor vehicle accident in which the automobile she was driving struck and killed Joseph Flynn, a pedestrian. Breathalyzer tests revealed a blood alcohol reading of 0.21% and respondent was issued summonses for reckless driving under N.J. Stat. Ann. sec. 39:4-96 and driving under the influence of alcohol under N.J. Stat. Ann. sec. 39:4-50. Respondent was thereafter indicted on April 4, 1984, for causing Flynn's death by driving a vehicle recklessly in violation of N.J. Stat. Ann. sec. 2C:11-5. She was acquitted of this latter charge at a jury trial in January 1985.

Respondent thereafter moved for dismissal of the other two charges on double jeopardy grounds and relied upon state caselaw construing this Court's opinion in *Illinois v. Vitale*.[2] The municipal court, relying

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[2] Although relying upon principles of double jeopardy, respondent did not contend, and has not contended, that her DWI trial should be barred on grounds relating to collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436 (1970). Portions of the existing record suggest that the jury acquitted respondent of the death-by-auto charge not because she was sober or driving with care, but rather because the victim himself was intoxicated and his own actions contributed to the collision resulting in his death. (Brief and Appendix on Behalf of the State of New Jersey in Support of Motion for Reconsideration, filed on March 24,

upon a prosecutorial concession, granted the motion to dismiss as to the reckless driving charge. The court denied the motion as to the DWI charge. The basis for this latter denial was that DWI is not a lesser included offense of death by auto; "[d]efendant is being tried in the municipal court on the same facts but not on the same charges." (App. B, at p. 21a). Respondent's motion for leave to appeal to the Superior Court, Law Division, on an interlocutory basis was granted.

At a hearing on July 29, 1985, respondent argued, based upon *Illinois v. Vitale* and state caselaw construing it, that the only proof pertinent to the element of reckless driving adduced at the death-by-auto prosecution was respondent's intoxication and that, therefore, submission of the identical evidence at a subsequent DWI trial would constitute impermissible double jeopardy. (Transcript of July 29, 1985, at Tr3-24 to 7-6; Tr10-17 to 11-1). In granting the motion to dismiss on August 1, 1985, the Superior Court, Law Division, determined that proofs as to recklessness adduced at the death-by-auto prosecution were limited solely to respondent's intoxication and concluded that compelling respondent to face the DWI charge after the death-by-auto acquittal would constitute double jeopardy. (App. C, at p. 23a). An order to this effect was entered on August 14, 1985. (App. D).

The petitioner State of New Jersey appealed this judgment to the Superior Court, Appellate Division. Both parties relied upon the double jeopardy clause

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1986 with the Clerk of the Superior Court of New Jersey, Appellate Division, appendix pp. Ma21 para. 6, Ma25 para. 9).

of the fifth amendment and *Illinois v. Vitale*. (See App. E, at p. 29a). The Appellate Division determined initially that the *Blockburger* elemental analysis would not result in a double jeopardy bar. (App. E, at p. 38a). The appellate court went on to conclude, however, that under *Illinois v. Vitale*, "the actual evidence in the matter now under review must be examined in an effort to ascertain if the first prosecuted greater offense was based on proofs which would have established the lesser offense." (App. E, at p. 38a). The appellate court applied this perceived alternative double jeopardy test to the facts herein and held that the "identical nature of the proofs" as to death by auto and DWI mandated the conclusion that principles of double jeopardy barred the prosecution for DWI. (App. E, at pp. 41a-42a).

The petitioner State of New Jersey timely moved for reconsideration on March 24, 1986. The motion for reconsideration was denied on April 2, 1986. (App. F, at pp. 43a-44a).

On May 5, 1986, the petitioner State of New Jersey petitioned the Supreme Court of New Jersey for certification to the Superior Court, Appellate Division. In its petition, the State discussed the language in *Illinois v. Vitale*, 447 U.S. at 421, where this Court said:

> [I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

The State's position was that the present case did not fall within the confines of the above proviso, and that, in any event, this Court's opinion in *Illinois v. Vitale* did not intend to revise the *Blockburger* test under which the elements, and not the evidence adduced, are the sole determinative factors. The State also argued that the Appellate Division was incorrect in its reliance upon respondent's allegation that no proofs of recklessness other than intoxication were adduced at the death-by-auto trial.

The Supreme Court of New Jersey granted the petition for certification, 104 N.J. 468, 517 A.2d 450 (1986), and on July 21, 1987, rendered its decision reversing the Appellate Division judgment and remanding to the Law Division for a review of the proofs adduced at the death-by-auto trial. (App. A). In its opinion the Supreme Court of New Jersey first reaffirmed its consistent interpretation of the double jeopardy protection afforded by the state constitution as co-extensive with the double jeopardy clause of the fifth amendment of the federal constitution. (App. A, at p. 3a). The state supreme court reviewed this Court's pertinent decisions involving the "same offense" determination for double jeopardy analysis (App. A, at pp. 4a-5a), and determined that the *Vitale* proviso, construed by the Appellate Division below, "enhanced the protection afforded a defendant facing a second prosecution on the same facts." (App. A, at pp. 8a-9a). According to the state supreme court, *Vitale* created an alternative test to the *Blockburger* elemental analysis for determining whether the double jeopardy clause bars a later prosecution. (App. A, at pp. 9a-10a). Because the supreme court was not provided with a transcript of the death-by-auto proceed-

ing and in light of the State's contention that evidence of recklessness other than intoxication was adduced, the case was remanded to the Superior Court, Law Division, to review the proofs of recklessness in the death-by-auto proceeding. According to the supreme court, "[i]f the State relied solely on intoxication as evidence of recklessness in the death-by-auto case, double jeopardy would bar the DWI prosecution. If, however, other evidence was adduced, the DWI prosecution will not be barred." (App. A, at p. 11a). Petitioner seeks review of the New Jersey Supreme Court's interpretation of *Illinois v. Vitale* and a determination from this Court that as a matter of law no remand is required as a prerequisite to respondent's DWI trial.

REASONS FOR GRANTING THE WRIT

A. Ambiguities in *Illinois v. Vitale* Urgently Need Resolution By This Court.

In *Thigpen v. Roberts*, 468 U.S 27, 36 (1984), Chief Justice (then Justice) Rehnquist expressed his opinion "that there are ambiguities in *Illinois v. Vitale* which urgently need resolution by this Court." The conflicting caselaw among state and federal courts, and the "confusion" (App. A, at p. 7a) noted by the Supreme Court of New Jersey in this case demonstrates that the "urgency" to which the Chief Justice referred continues to this date. This case presents this Court with the opportunity to reduce or to eliminate this confusion. Without this Court's guidance, lower courts will continue in a state of intellectual uncertainty and vacillation as they attempt to divine the true meaning of the federal double jeopardy clause. The extent of the ambiguities and confusion arising from *Illinois v.*

Vitale, 447 U.S. 410 (1980), and their relationship to this case, may properly begin with a discussion of this Court's double jeopardy caselaw prior to *Illinois v. Vitale*.

The double jeopardy clause of the fifth amendment of the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." Through the due process clause of the fourteenth amendment, this constitutional guarantee applies against the states. *Benton v. Maryland*, 395 U.S. 784 (1969). In determining whether to apply the double jeopardy bar, the primary concern is whether the second prosecution is for the "same offense" involved in the first. This Court outlined the appropriate test in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), in which this Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." The "required facts" to which this test refers are the elements of the respective offenses. This was made clear in *Brown v. Ohio*, 432 U.S. 161, 166 (1977), in which this Court iterated that the test depends upon an analysis of the statutory elements of the offense, rather than the proofs actually offered at trial. See also *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (*Blockburger* test is satisfied if each offense requires proof of fact the other does not, notwithstanding substantial overlap in proof offered).

However, the clarity of the *Blockburger* test was clouded by this Court's opinion in *Illinois v. Vitale*.

In *Vitale*, the juvenile defendant was charged with involuntary vehicular manslaughter. He was previously convicted of careless failure to slow his car in order to avoid an accident, a charge arising from the same incident. Thus, the question presented to this Court was whether careless failure to slow was the "same offense" for double jeopardy purposes as involuntary manslaughter. This Court determined that the lower court opinions did not contain sufficient information about Illinois law to answer that question under the *Blockburger* test. *Id.* at 419. This Court explained:

> [I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the prosecution.

Id. Therefore, this Court remanded for further determination under Illinois law regarding the relationship between the elements of the two charges and whether a careless failure to slow is always a necessary element of manslaughter by automobile.

If this Court had stopped at that point, the subsequently developed confusion would likely not have arisen. However, this Court went on to examine another of its double jeopardy opinions, *Harris v. Oklahoma*, 433 U.S. 682 (1977). In *Harris*, this Court held that a felony murder conviction barred a subsequent robbery prosecution because robbery was the felony underlying the first prosecution. Although, in some

sense, the traditional *Blockburger* test was not satisfied because each offense required proof of an element not required by the other (*i.e*, the felony murder, at least theoretically, did not require proof of a robbery), this Court "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." *Vitale*, 447 U.S. at 420. Under this analysis the robbery and the felony murder were thus the "same offense."

This Court in *Vitale* then indicated that more may be required than a statutory analysis of the elements of the two offenses:

> [I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 421.

This seemingly inconsistent language is the primary source of the recognized confusion among state courts, federal courts, and some justices of this Court. See, *e.g.*, *Thigpen v. Roberts*, 468 U.S. at 33 (Rehnquist, J., dissenting); *Illinois v. Zegart*, 452 U.S. 948 (1981) (Burger, C.J., dissenting from denial of *certiorari*); *Henry v. McFaul*, 791 F.2d 48, 52 n.4 (6th Cir. 1986). As a result of this language, courts are not certain whether the actual evidence adduced at the first trial is ever relevant to the double jeopardy inquiry, and if so, under what circumstances it becomes relevant. Moreover, even if the evidence adduced is relevant,

and even if the prosecutor relies upon and proves the lesser offense as the act necessary to prove an element of the greater offense, courts are not certain whether the "substantial claim of double jeopardy" to which the *Vitale* Court referred would, in fact, be sufficiently substantial to be successful and to provide the defendant with a bar to subsequent prosecution.

Decisions construing *Vitale* have run the gamut. Several courts, concluding that *Vitale* did not alter the original *Blockburger* test, have continued to compare only the statutory elements. For these courts the test continues to be whether each offense requires proof of an element not required by the other. *Thigpen v. Roberts*, 468 U.S. at 33 (Rehnquist, J., dissenting); *Illinois v. Zegart*, 452 U.S. at 948 (Burger, C.J., dissenting from denial of *certiorari*); *Henry v. McFaul*, 791 F.2d at 50-51 (expressly rejecting defendant's attempt to utilize *Vitale* for the proposition that prosecution for an offense requiring proofs previously employed to obtain convictions on charges arising from the same single series of events is barred by the double jeopardy clause); *United States v. Black*, 759 F.2d 71, 73 (D.C. Cir. 1985) (rejecting assertion that it is the actual evidence introduced at each trial, not the statutory elements of each charged crime, that determines the scope of double jeopardy protection); *Mathews v. Marshall*, 754 F.2d 158, 159-60 (6th Cir. 1985), rev'd on other grounds *sub nom. Morris v. Mathews*, 475 U.S. 237 (1986); *United States v. Coachman*, 727 F.2d 1293, 1301-03 (D.C. Cir. 1984) (rejecting assertion that court should look at facts as alleged in indictment and established by the evidence); *State v. Truppi*, 182 Conn. 449, 468, 438 A.2d 712, 722 (1980), *cert.* denied, 451 U.S. 941 (1981); *Com-*

monwealth v. Allen, 506 Pa. 500, 486 A.2d 363 (1984), *cert.* denied, 106 S. Ct. 128 (1985); *Cepulonis v. Commonwealth*, 384 Mass. 495, 501 n.5, 427 N.E.2d 17, 22 n.5 (1981), appeal dismissed, 455 U.S. 931 (1982); *State v. Forbes*, 523 A.2d 1232, 1235 (Vt. 1987).

Indeed, several courts have determined that *Vitale* simply applied the traditional *Blockburger* analysis. See *Henry v. McFaul*, 791 F.2d at 50-51 (where the court applied traditional *Blockburger* analysis "as the Court did in *Vitale*" to conclude that an attempted murder prosecution, based upon a narrow miss of a police officer at a roadblock, was not barred because of earlier guilty pleas to charges, arising from the same incident, of speeding, reckless operation of a vehicle and fleeing and eluding a police officer); *United States v. Patterson*, 782 F.2d 68, 72-73 (7th Cir. 1986) (but finding a potential collateral estoppel problem and remanding for a review of the entire transcript); *Commonwealth v. Allen*, 506 Pa. 500, 486 A.2d 363. Similarly, *Vitale* has been cited for the affirmative proposition that "we do not examine the evidence to determine how a defendant actually violated the statutes." *State v. Truppi*, 182 Conn. at 468, 438 A.2d at 722.

Other courts, like the New Jersey Supreme Court in this case, have construed *Vitale* to provide a defendant with an enhanced protection beyond that provided by *Blockburger*. However, the extent of this additional protection varies from court to court. Some courts have concluded that *Vitale* supports a modification of the *Blockburger* test to require an examination of specific statutory elements sought to be proved. *E.g.*, *Lee v. Probate Court of Davidson County*, 807 F.2d 512, 514 (6th Cir. 1986) (recognizing that

the *Blockburger* test has been modified "over the years" and concluding, with a citation to *Illinois v. Vitale*, that "it is now clear that the requisite statutory elements must be examined from the vantage point of the particular case before it"); *United States v. Barrington*, 806 F.2d 529, 533-34 (5th Cir. 1986) (apparently accepting the Sixth Circuit's observation that the *Blockburger* test has been modified by *Whalen v. United States*, 445 U.S. 684 (1980), and *Vitale*, so that "[t]he comparable proof of the two offenses must now be examined with respect to the particular case"); *Mathews v. Marshall*, 754 F.2d at 159-60; *Pandelli v. United States*, 635 F.2d 533 (6th Cir. 1980).

Some courts have viewed the *Vitale* proviso language as creating a new species of "lesser-included offense" analysis. *E.g.*, *United States v. Gibson*, 820 F.2d 692, 697, 698 (5th Cir. 1987) (construing *Illinois v. Vitale* to mean that if Vitale's fatal recklessness was a failure to reduce speed, then this latter offense would be a lesser-included offense of manslaughter, subsequent prosecution for which would be barred; the court of appeals also viewed the *Vitale* Court as concerned with whether Vitale's driving constituted one or two evils that the State sought to combat); *Davis v. Herring*, 800 F.2d 513, 514, 518-19 (5th Cir. 1986) (vacating *sua sponte* its earlier opinion wherein the *Vitale* proviso was interpreted as an application of the "same evidence" test of *Ex parte Nielsen*, 131 U.S. 176 (1889), as applied in *Brown v. Ohio*, 432 U.S. 161 (1977), and *Harris v. Oklahoma*, 433 U.S. 682 (1977), and concluding under this Court's interpretation of *Harris* in *Vitale* that, based upon what the jury considered, a shooting felony was a lesser-included offense of murder); *Flittie v. Solem*, 775 F.2d

933, 937-39 (8th Cir. 1985), *cert.* denied, 106 S. Ct. 1223 (1986) (where the court construed the *Vitale* proviso language as an indication of this Court's concern "that the same evidence would be offered at retrial solely to prove conduct that was a necessary element of the offense of which the defendant had already been convicted;" according to the court of appeals, this Court "saw the issue as whether, in retrospect, the state had merely proven a lesser (or greater) included offense"); *State v. Forbes*, 523 A.2d at 1235 (*Blockburger* double jeopardy analysis utilized and *Vitale* cited for proposition that lesser is considered included in greater only if "each of its elements is 'always a necessary element' of the greater offense"); see *Sekou v. Blackburn*, 796 F.2d 108, 110-12 (5th Cir. 1986) (utilizing the *Vitale* proviso language to hold ultimately that the double jeopardy clause does not bar successive prosecutions for felony murder and an underlying felony so long as the latter "does not form the sole basis for the felony-murder prosecution").

On the other hand, other courts have found that *Vitale* has significantly expanded double jeopardy protection. In *People v. Lowe*, 660 P.2d 1261, 1267 (Colo. 1983), the state supreme court decided the case on a basis other than federal or state double jeopardy principles, but initially determined that the *Blockburger* test applies only to resolve merger questions involving identity of elements, and has never been applied to a prosecution where the accused is charged with committing the crime in alternative ways; furthermore, *Illinois v. Vitale* "offered yet another approach to double jeopardy protection:" a "new application focused on the actual proof to be pre-

sented at trial rather than the abstract proof necessary to establish the statutory elements." In *United States v. Kimberlin*, 781 F.2d 1247, 1255-57 (7th Cir. 1985), *cert.* denied, 107 S. Ct. 419 (1986), the court rejected the appellant's contention that the same allegations and evidence were adduced to prove both his conviction for possession of a Department of Defense patch and his conviction for impersonation of a department official and applied the traditional *Blockburger* analysis to find no double jeopardy bar to two convictions and punishment; the court noted, nonetheless, citing to *Vitale*, "that utilization of defendant's possession of the patch to prove violations of both [the possession statute] and [that alternative portion of the impersonation statute requiring an overt act to support the pretense] would raise substantial double jeopardy problems." In *State v. McGaughy*, 505 So.2d 391, 401-03 (Ala. Crim. App. 1987), the court determined *Blockburger* presented no double jeopardy bar, but said that under *Vitale*, "if the D.U.I. constitutes the State's sole evidence of reckless conduct necessary to establish a violation of [the statute proscribing extreme reckless conduct creating a grave risk of death and causing serious bodily physical injury], then appellant would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments."

Finally, in *United States v. Hoelker*, 765 F.2d 1422, 1427-28 (9th Cir. 1985), *cert.* denied, 106 S. Ct. 1219 (1986), the court recognized *Blockburger* as the principal test for determining the "same offense" for double jeopardy purposes, and acknowledged the *Vitale* proviso, but distinguished the case before it from *Vitale* and *Brown* because no criminal acts of cocaine

possession and distribution alleged in the present indictment were alleged in the prior indictment of which that defendant was convicted. In *Pugliese v. Perrin*, 731 F.2d 85, 89 (1st Cir. 1984), the court applied the "rationale" of the *Vitale* proviso to uphold on double jeopardy and collateral estoppel grounds the grant of habeas relief to a defendant who could not be reprosecuted for manslaughter, and who was subjected at a subsequent trial to a jury instruction that allowed a conviction for negligent homicide on the "proof of purposeful, knowing or reckless conduct which could only be the basis for" the manslaughter conviction of which he was already acquitted.

From the foregoing, it is apparent that courts remain in substantial confusion as to whether *Illinois v. Vitale* has afforded additional protection against double jeopardy, and if so, as to the scope of that protection. The Supreme Court of New Jersey in this case noted this "confusion" (App. A, at p. 7a), and furthermore noted that its construction of *Illinois v. Vitale* in this case affords more protection than the construction which it made merely four years earlier in a similar case. (App. A, at pp. 9a-10a). Nevertheless, in this case the court opted for the construction providing "enhanced . . . protection" (App. A, at p. 9a), so long as "the State's case [in the first prosecution] depended solely on evidence of intoxication to prove recklessness." (App. A, at p. 11a). Petitioner submits that the New Jersey Supreme Court erred (see discussion *infra*) and therefore urges this Court to vacate the New Jersey Supreme Court's judgment foreclosing respondent's prosecution for DWI unless the trial court finds evidence of recklessness beyond mere intoxication in the first trial. However, whether

erroneous or not, the New Jersey Supreme Court's judgment should be reviewed by this Court so that this Court may reduce the confusion which the New Jersey Supreme Court and other courts have confronted in their attempts to construe this Court's opinion in *Illinois v. Vitale*.

B. No Remand Is Necessary to Determine That Any Additional Protection Against Double Jeopardy Which May Devolve From *Illinois v. Vitale* Does Not Inure to Respondent's Benefit.

This subpoint assumes, for the sake of argument, that the New Jersey Supreme Court was correct in concluding that *Illinois v. Vitale* provided an alternative, independent test for double jeopardy which in some cases affords a criminal defendant greater protection than that which he would have under traditional *Blockburger* analysis. Petitioner nevertheless contends that the New Jersey Supreme Court erred in holding that a remand was necessary to determine whether respondent should be afforded that additional protection in this case. The expanded scope of double jeopardy protection is simply not available to the respondent in this case because, as developed below, New Jersey law does not view driving while intoxicated as an inevitable example or species of reckless driving. Petitioner contends that the additional *Vitale* protection enunciated, but not logically applied, by the state supreme court arises only when the lesser offense is itself an example or a species of, or inevitably establishes an element (in this case, recklessness) of, the greater offense.

The confusion concerning the scope of any additional double jeopardy protection which may have devolved from *Illinois v. Vitale* was discussed in

subpoint A, *supra*, and is apparent from the New Jersey Supreme Court's opinion in this case. On the one hand, the court included language in its opinion which seems to suggest that a statutory, elemental analysis is irrelevant to the additional protection afforded. The court broadly asserted:

> If the same evidence used in the first prosecution is the sole evidence in the second, the prosecution of the second offense is barred.

(App. A, at p. 10a). However, other language in the court's opinion suggests that the test for the additional protection afforded by *Illinois v. Vitale* requires at least, in part, a consideration of the statutory elements. That is, the court focused upon the element of recklessness in the greater offense when it held that the test is whether

> the State's case [in the first prosecution] depended solely on evidence of intoxication to prove recklessness.

(App. A, at p. 11a).

Whatever else may be said about this matter, it is clear that a statutory, elemental analysis must be relevant to the additional *Vitale* protection. If the broad language first quoted above from the New Jersey Supreme Court's opinion were correct, then *Vitale* would not merely supplement *Blockburger*; it would have overruled it, and adopted a "single transaction" view of the double jeopardy clause. This Court, however, has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." *Garrett v. United States*, 471 U.S. 773, 790 (1985). Thus, the narrower language secondly quoted is closer

to the appropriate elemental analysis, but also misses the mark because it fails to acknowledge the significance of the fact that, under New Jersey law, "[d]riving while drunk does not necessarily translate into reckless driving." *State v. Dively*, 92 *N.J.* 573, 583 n.7, 458 A.2d 502, 507 n.7 (1983).[3] It is only when the lesser offense is itself an example of, or a species of, or inevitably establishes an element of the greater offense that the additional *Vitale* protection comes into play. See *United States v. Woodward*, 469 U.S. 105, 108 (1985).

This construction of *Vitale* is supported by an examination of the *Vitale* Court's rationale to explain the "substantiality" of the defendant's double jeopardy claim. In *Vitale* this Court relied upon its earlier opinion in *Harris v. Oklahoma*, 433 U.S. 682 (1977), which held that a conviction for felony murder barred a subsequent prosecution for the predicate felony—in that case, robbery. *Illinois v. Vitale*, 447 U.S. at 420. Relying upon traditional *Blockburger* analysis, the State of Oklahoma had attempted to argue that since the felony murder statute did not, on its face, require proof of a robbery, robbery was not a lesser included offense and hence not the "same" offense for double jeopardy purposes. However, the State "conceded that

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[3] *State v. Dively* was the first case in which the New Jersey Supreme Court attempted to interpret this Court's opinion in *Illinois v. Vitale*. In the present case the New Jersey Supreme Court acknowledged that it was revising the *Dively* interpretation of *Vitale*. (App. A, at pp. 9a-10a). However, nothing in this case remotely suggests the court's intention to modify the *Dively* construction of principles of state law. Indeed, the court reaffirmed *Dively* except for *Dively*'s failure to recognize the enhanced double jeopardy protection allegedly afforded by *Illinois v. Vitale*. (App. A, at p. 10a)

the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution." 447 U.S. at 420-21. The *Harris* Court rejected Oklahoma's argument, since the State conceded it proved the lesser offense—robbery—as the act necessary to establish the felony element of the felony murder. The *Vitale* Court held that "[b]y analogy" the *Vitale* defendant would have a "substantial" claim "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter." *Id.* at 421. The "analogy" to which this Court referred is the comparison of robbery (in *Harris*) and careless failure to slow (in *Vitale*) to the elements of committing a felony (in *Harris*) and recklessness (in *Vitale*)—*i.e.*, the analogy that the lesser offense is an example or species of an element in the greater offense. Stating the proposition somewhat differently (although obviously with the same meaning), the United States Court of Appeals for the Sixth Circuit has concluded that the additional *Vitale* protection arises only when the lesser offense is one of "multiple possible meanings contained within a single word" establishing the element of the greater offense (in this case, like *Vitale*, the word being "recklessness"). *Pandelli v. United States*, 635 F.2d 533, 538 (6th Cir. 1980).

Thus, the New Jersey Supreme Court erred in holding that the enhanced *Vitale* protection applied to respondent in this case. Intoxication, while usually *relevant* to recklessness, is not itself a species of or a possible meaning of the word "recklessness." Under New Jersey law,

> [d]riving while drunk does not necessarily translate into reckless driving. It is possible that a vehicle operated by an inebriated driver is not driven recklessly and obviously there are drivers who are reckless but not drunk.

State v. Dively, 92 *N.J.* at 583 n.7, 458 A.2d at 507 n.7. Under the *Pandelli* construction of *Vitale*, respondent should therefore be denied enhanced double jeopardy protection.

The New Jersey Supreme Court in this case purported to follow the *Pandelli* rationale. (App. A, at p. 11-12a). The court agreed that in applying the *Blockburger* test as modified by *Vitale*, courts "must narrow the statute to be analyzed until it includes only the alternatives relevant to the case at hand." (App. A, at p. 12a, quoting from *Pandelli v. United States*, 635 F.2d at 538). The court thus recognized that "'recklessness,' an element of death by auto, is capable of many possible meanings, including, as was the case in *Vitale*, failure to slow." (App. A, at p. 12a). The court inexplicably did not recognize, however, the significance of the fact that under New Jersey law, driving while intoxicated is *not* an alternative meaning of recklessness. The court erred, and this Court should grant the petition for *certiorari* and reverse the judgment of the New Jersey Supreme Court.

C. *Illinois v. Vitale* Should Not Be Construed to Afford Criminal Defendants Greater Protection Against Double Jeopardy Than That Provided Under Traditional *Blockburger* Analysis.

Petitioner submits that the *Vitale* Court "did not intend to transmute the traditional double jeopardy

analysis from an either 'up or down' inquiry based on the evidence required to prove the statutory elements of a crime into a 'substantial claim' inquiry based on the evidence the State introduced at trial." *Thigpen v. Roberts*, 468 U.S. at 36 (Rehnquist, J., dissenting). *Vitale* did not overrule *Brown v. Ohio*, 432 U.S. 161 (1977), which emphasized that an analysis of the statutory elements, rather than the proofs actually adduced at trial, is the linchpin of the *Blockburger* double jeopardy test. Since *Vitale*, this Court has reaffirmed the *Blockburger* test that the evidence required to prove the statutory elements of a crime determines whether particular crimes are the same offense for double jeopardy purposes. See *United States v. Woodward*, 469 U.S. at 108; *Missouri v. Hunter*, 459 U.S. 359, 367-68 (1983); *cf. Garrett v. United States*, 471 U.S. at 790.

This Court could not have intended that *Vitale* should modify the traditional analysis of *Blockburger v. United States*, because the policy considerations militating against modification are compelling. For example, the *Blockburger* test has the virtue of certainty and ease of application. The *Vitale* test adopted by the New Jersey Supreme Court and other courts has the vice of uncertainty and confusion. In New Jersey, if a criminal defendant is first tried for death by auto, the parties will not know whether DWI is the "same offense" as death by auto until the prosecutor has completed his case-in-chief, or possibly, until the end of trial, since it is not inconceivable that the defendant's case might adduce proofs of recklessness independent of intoxication which were not present in the prosecutor's case, and which would suffice to render the offenses "different" offenses within the

meaning of *Vitale* as construed by the New Jersey Supreme Court and other misguided courts.

Obviously, it is preferable for the parties to know in advance whether the more serious and the less serious offenses must be joined for a single trial. The uncertainty would virtually require joinder as a precautionary measure in every case, thus eliminating the preference of many states including New Jersey (App. A, at p. 13a) to try less serious offenses and vehicular infractions (such as DWI) in local nonjury courts of limited jurisdiction and to try the serious crimes (such as death by auto) in trial courts of statewide jurisdiction.

Beyond this, the *Blockburger* test is easy to administer. The proposed alternative tests which some courts perceive to be required by *Vitale* are not. In this case, for example, the New Jersey Supreme Court has required a remand to the Superior Court, Law Division, as a prerequisite to respondent's DWI trial in the municipal court. Specifically, the Law Division judge must determine whether the State relied exclusively upon intoxication in its attempt to prove recklessness at the earlier death-by-auto trial. This is a task worthy of King Solomon. The judge may be hard put to know whether a specific piece of evidence pertains to respondent's intoxication or her recklessness independent of intoxication. If a witness testified that respondent, uninjured after the collision with the pedestrian, was nevertheless incoherent, lacking motor coordination, and obviously incapable of driving, this testimony might properly suggest both that she was intoxicated and drove without care, thus presenting the Law Division judge with the dilemma of determining whether the New Jersey Supreme Court's

double jeopardy test was or was not met. Similarly, the Law Division judge might find evidence of carelessness independent of intoxication but conclude that that independent evidence, by itself, was insufficient to establish a *prima facie* case for recklessness. The potential confusion which may be generated by these unfortunate modifications of the traditional *Blockburger* analysis is manifold.

For the foregoing reasons, petitioner submits that *Illinois v. Vitale* did not, or should not be construed to, revise the traditional *Blockburger* test. The New Jersey Supreme Court erred in ruling that *Illinois v. Vitale* affords a criminal defendant greater double jeopardy protection than that which he receives under traditional *Blockburger* analysis and this Court should intervene to correct the New Jersey Supreme Court's error.

CONCLUSION

Based upon the foregoing reasons this petition for *certiorari* should be granted. State courts, federal courts, and members of this Court have expressed concern and confusion as to this Court's intendment in *Illinois v. Vitale*. This case concretely presents the question whether *Illnois v. Vitale* affords greater double jeopardy protection to criminal defendants than that provided under traditional *Blockburger* analysis, and if so, what the scope of that additional protection should encompass. Petitioner submits that the New Jersey Supreme Court erred. Whether erroneous or not, however, the court's opinion and judgment warrant review by this Court.

Respectfully submitted,

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Of Counsel and on the Petition
DATED: September 18, 1987

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-89 September Term 1986

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LINDA DE LUCA,

Defendant-Respondent.

Argued January 6, 1987—Decided July 21, 1987

On certification to the Superior Court, Appellate Division, whose opinion is reported at 208 *N.J. Super.* 422 (1986).

Larry R. Etzweiler, Deputy Attorney General, argued the cause for appellant (*W. Cary Edwards,* Attorney General of New Jersey, attorney).

Christopher J. LaMonica argued the cause for respondent (*Wilbert & Montenegro,* attorneys).

The opinion of the Court was delivered by POLLOCK, J.

The primary question on this appeal is whether an acquittal of death by auto, *N.J.S.A.* 2C:11-5, should bar a subsequent prosecution for driving while under the influence (the DWI charge), *N.J.S.A.* 39:4-50.

After a jury trial in the Law Division, defendant was acquitted of causing death by auto. Thereafter she moved in the Dover Township Municipal Court to dismiss the DWI charge, but the court denied the motion. On appeal, however, the Law Division granted the motion to dismiss. The

Appellate Division affirmed, 208 *N.J. Super.* 422 (1986), stating that the prosecution had conceded that its only evidence of recklessness to support the death-by-auto charge was defendant's alleged intoxication. *Id.* at 426. Before us, the Attorney General challenges that statement and contends that various facts, including the weather, road, and lighting conditions, were such that the happening of the accident raises an inference of recklessness apart from evidence of defendant's intoxication. We granted certification, 104 *N.J.* 468 (1986), and now reverse and remand to the Law Division.

-I-

At approximately 1:00 a.m. on January 29, 1984, a car operated by defendant, Linda DeLuca, on Clifton Avenue, Dover Township, Ocean County, struck and killed a pedestrian. DeLuca had spent the evening at the home of Sharon Peet, where she had consumed alcoholic beverages. Defendant offered to drive Miss Peet to a store to purchase cigarettes, and on the return trip, defendant's vehicle struck the pedestrian. The weather was clear, and the road was dry and well lighted. Defendant's vehicle left no skid marks, and no other vehicle was involved in the accident. The breathalyzer test revealed defendant's blood alcohol content as .21%.

Initially, defendant was charged in the Dover Township Municipal Court with DWI and reckless driving. Thereafter she was indicted by the Ocean County Grand Jury for causing death by auto. After her acquittal following a jury trial on that indictment, defendant moved in the Municipal Court to dismiss the DWI and reckless driving charges. The State agreed to dismiss the reckless driving charge because of double jeopardy; the Municipal Court, however, denied defendant's motion to dismiss the DWI charge.

Relying on *State v. Dively*, 92 *N.J.* 573 (1983), however, the Law Division reversed. The court found that the DWI

prosecution was barred by double jeopardy because the State intended to rely on the same evidence used to prove recklessness in the death-by-auto prosecution, namely, intoxication.

In affirming, the Appellate Division found that the charges of death by auto and DWI each required proof of elements not required by the other. The court, nonetheless, agreed with the Law Division that because the State would rely on the same proofs in both prosecutions, the DWI prosecution was barred.

In light of the State's representation that evidence other than intoxication was adduced in the trial of the death-by-auto indictment, we are constrained to remand the matter to the Law Division to determine whether such proof was adduced or whether intoxication was offered as the sole proof of defendant's recklessness in that prosecution.

-II-

Our analysis begins with the double jeopardy clause of the fifth amendment of the United States Constitution, which provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *." Through the due process clause of the fourteenth amendment, this constitutional guarantee applies against the states. *Illinois v. Vitale,* 447 *U.S.* 410, 415, 100 *S. Ct.* 2260, ___, 65 *L.Ed.*2d 228, 235 (1980); *Benton v. Maryland,* 395 *U.S.* 784, 794, 89 *S. Ct.* 2056, 2062, 23 *L.Ed.*2d 707, 716 (1969). The parallel provision in the State Constitution is article I, paragraph 11, which provides: "No person shall, after acquittal, be tried for the same offense." We have consistently interpreted the state constitutional double jeopardy protection as co-extensive with the guarantee of the federal Constitution. *State v. Dively, supra,* 92 *N.J.* at 573, 578; *State v. Barnes,* 84 *N.J.* 362, 370 (1980); *State v. Rechtschaffer,* 70 *N.J.* 395, 404 (1976); *State v. Wolf,* 46 *N.J.* 301, 303 (1966).

The United States Supreme Court has stated that the double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 *U.S.* 711, 717, 89 *S. Ct.* 2072, 2076, 23 *L.Ed.*2d 656, 664-65 (1969) (footnotes omitted). The present case involves the protection accorded by the clause against a second prosecution for the same offense after acquittal. Nonetheless, underlying all the protections provided by the clause is the principle

> that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> [*Green v. United States*, 355 *U.S.* 184, 187-88, 78 *S. Ct.* 221, ___, 2 *L.Ed.*2d 199, 204 (1957).]

In determining whether to apply the double jeopardy bar, the primary concern is whether the second prosecution is for the "same offense" involved in the first. *See* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 *Iowa L. Rev.* 323 (1986) (*Prohibition of Successive Prosecutions*). The United States Supreme Court outlined a frequently applied federal test in *Blockburger v. United States*, 284 *U.S.* 299, 52 *S. Ct.* 180, 76 *L.Ed.* 306 (1932). *See also Prohibition of Successive Prosecutions, supra*, 71 *Iowa L. Rev.* at 330-35 (discussing potential tests for defining "same offense"). There, the defendant was charged with several offenses stemming from the same course of conduct, all of which were prosecuted together. The Court stated that "where

the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 *S. Ct.* at ___, 76 *L.Ed.* at 309; *accord State v. Dively, supra,* 92 *N.J.* at 579.

In *Brown v. Ohio,* 432 *U.S.* 161, 97 *S. Ct.* 2221, 53 *L.Ed.*2d 187 (1977), the High Court extended the *Blockburger* test to apply to successive prosecutions. The defendant in *Brown* had pleaded guilty to a charge of joyriding, and was later indicted for auto theft, which was defined as "joyriding with the intent permanently to deprive the owner of possession." *Id.* at 167, 97 *S. Ct.* at ___, 53 *L.Ed.*2d at 195. Applying the *Blockburger* test, the Court held that because the offense of joyriding required no proof beyond that necessary to convict the defendant of auto theft, the prosecution for theft was barred by the prior joyriding conviction. The Court iterated that the test depended on an analysis of the statutory elements of the offense, rather than the proofs actually offered at trial. *Id.* at 166, 97 *S. Ct.* at ___, 53 *L.Ed.*2d at 194; *see also Ianelli v. United States,* 420 *U.S.* 770, 785 n.17, 95 *S. Ct.* 1284, ___ n.17, 43 *L.Ed.*2d 616, 627 n.17 (1975) (*Blockburger* test is satisfied if each offense requires proof of fact the other does not, notwithstanding substantial overlap in proof offered).

The apparent clarity of the *Blockburger* test has become clouded, however, by the Court's interpretation of double jeopardy in *Illinois v. Vitale,* 447 *U.S.* 410, 100 *S. Ct.* 2260, 65 *L.Ed.*2d 228 (1980). In *Vitale,* the defendant was charged with involuntary manslaughter. He had previously been convicted of failure to slow his car in order to avoid an accident, a charge arising from the same incident as the manslaughter charge. Thus, the question presented to the Court was whether failure to slow was the "same offense" for double jeopardy purposes as involuntary man-

slaughter. The Court determined that the record did not contain sufficient information under Illinois law to answer that question under the *Blockburger* test. *Id.* at 419, 100 *S.Ct.* at ___, 65 *L.Ed.*2d at 237. The Court continued,

> if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.
>
> [*Id.*, 100 *S. Ct.* at ___, 65 *L.Ed.*2d at 237.]

Therefore, the Court remanded for additional information regarding the relationship between the two charges and the determination of whether a careless failure to slow is always a necessary element of manslaughter by automobile.

The Court, however, went on to examine another of its double-jeopardy opinions, *Harris v. Oklahoma,* 433 *U.S.* 682, 97 *S. Ct.* 2912, 53 *L.Ed.*2d 1054 (1977). In *Harris,* the Court held that a felony murder conviction barred a subsequent robbery prosecution when robbery was the felony underlying the first prosecution. Although the traditional *Blockburger* test was not satisfied because each offense required proof of an element not required by the other, the Court concluded that it had "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." *Vitale, supra,* 447 *U.S.* at 420, 100 *S. Ct.* at ___, 65 *L.Ed.2d* at 238.

The Court then indicated that more was required than a mechanical analysis of the elements of the two offenses

> if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to

> avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.
>
> [*Id.* at 421, 100 *S. Ct.* at ___, 65 *L.Ed.*2d at 238.]

This seemingly inconsistent language in *Vitale* has created some confusion among state courts, federal courts, and some members of the United States Supreme Court. *See, e.g., Thigpen v. Roberts,* 468 *U.S.* 27, 104 *S. Ct.* 2916, 82 *L.Ed.*2d 23 (1984) (Rehnquist, J., dissenting); *State v. Zegart,* 452 *U.S.* 948, 101 *S. Ct.* 3094, 69 *L.Ed.*2d 961 (1981) (Burger, C.J., dissenting from denial of *certiorari*); *United States v. Kimberlin,* 781 *F.*2d 1247, 1256 (7th Cir. 1985), *cert. denied,* 107 *S. Ct.* 419, 93 *L.Ed.*2d 370 (1986); *People v. Reed,* 92 *Ill. App.* 3d 1115, ___, 416 *N.E.*2d 694, 698 (1981).

Several courts, concluding that *Vitale* did not alter the original *Blockburger* test, have continued to compare the statutory elements. For these courts, the test continues to be whether each offense requires proof of an element not required by the other. *Thigpen v. Roberts, supra,* 468 *U.S.* 27, 104 *S. Ct.* 2916, 82 *L.Ed.*2d 23 (Rehnquist, J., dissenting); *State v. Zegart, supra,* 452 *U.S.* 948, 101 *S. Ct.* 3094, 69 *L.Ed.*2d 961 (Burger, C.J., dissenting from denial of *certiorari*); *United States v. Grimes,* 573 *F. Supp.* 1202 (S.D. Ohio 1983); *State v. Timms,* ___ *R.I.* ___, 505 *A.*2d 1132 (1986). Under this test, it is unnecessary to focus on the proof actually offered at trial.

In *State v. Dively, supra,* 92 *N.J.* 573, however, this Court recently provided a different interpretation of the effect of *Vitale* on the *Blockburger* test. In *Dively,* the defendant was driving his car in an intoxicated state and caused an accident that resulted in a death. Among the offenses with which he was charged were drunk driving,

reckless driving, driving without a license, and failure to keep right. An additional summons was later issued charging driving after license revocation. The reckless driving and failure-to-keep-to-the-right charges were merged into the DWI charge, and the defendant pleaded guilty to DWI, driving without a license, and driving while on the revoked list. The Grand Jury later issued an indictment against the defendant for death by auto. Although he pleaded guilty, the defendant reserved his right to challenge the death-by-auto conviction because of double jeopardy.

This Court considered the two offenses of reckless driving and death by auto to see if there was a double jeopardy bar to the death-by-auto prosecution. Although it was clear in *Dively* that the *Blockburger* elemental test had been satisfied, we concluded that the United States Supreme Court had created a two-pronged test to determine when double jeopardy should apply. *State v. Dively, supra,* 92 *N.J.* 573; *see also* Note, *The Impact of Expanded Rules for Determining What Constitutes the "Same Offense" for Double Jeopardy Purposes: Illinois v. Vitale,* 1980 *B.Y.U. L. Rev.* 948. We stated that "[i]t is only when both prongs are met that double jeopardy applies." *Id.* at 581; *see also State v. Calvacca,* 199 *N.J. Super.* 434 (App. Div. 1985) (elemental analysis unnecessary because evidentiary prong not satisfied).

The first prong of the test, as recognized in *Dively,* consists of the traditional *Blockburger* analysis, which focuses on the elements of the offenses. The inquiry is whether each offense requires proof of an additional fact not necessary for the other offense. If so, the two offenses are not the same for double jeopardy purposes, and the second prosecution is not barred.

In the present case, the Appellate Division first concluded that the elements of death by auto were different from those of DWI. Notwithstanding *Dively's* requirement of satisfying both prongs of the double jeopardy test, the

court proceeded to consider the effect of the proof of intoxication in the death-by-auto case on the subsequent DWI charge. The Appellate Division relied on the statement in *Vitale* that the defendant "would have a substantial claim of double jeopardy" if the same evidence used to prove the first offense is necessary to prove the second offense. *State v. DeLuca, supra,* 208 *N.J. Super.* at 434.

Other courts have also read this language as creating an alternative test, independent of the *Blockburger* analysis. *See State v. Grampus,* 343 *S.E.*2d 26 (S.C. 1986); *see also People v. Jackson,* 144 *Ill. App.* 3d 131, 494 *N.Ed.*2d 571 (1986) (looking at factual basis to bar reckless homicide prosecution following guilty plea to DWI); Thomas, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem,* 78 *N.W.U. L. Rev.* 1359, 1387 (1984) (*RICO Prosecutions and Double Jeopardy*) (if no double jeopardy bar under *Blockburger,* look to second test). In his dissent in *Thigpen, supra,* 468 *U.S.* at 33, 104 *S. Ct.* at 2920, 82 *L.Ed.*2d at 30, Justice Rehnquist disagreed with this interpretation, insisting that the Court never intended to create a new test based on the evidence actually adduced in the first prosecution. *See also State v. Zegart, supra,* 452 *U.S.* 948, 101 *S. Ct.* 3094, 69 *L.Ed.*2d 961 (Burger, C.J., dissenting from denial of *certiorari*) (court should grant *certiorari* to clarify that review must center on statutory elements, not facts or proof). The majority of the Supreme Court, however, refused to reach this issue in *Thigpen,* and affirmed the lower court's decision on due process grounds. 468 *U.S.* 27, 104 *S. Ct.* 2916, 82 *L.Ed.*2d 23. We are persuaded that the more accurate reading of *Vitale* is that it enhanced the protection afforded a defendant facing a second prosecution on the same facts. *See, e.g., Prohibition of Successive Prosecutions, supra,* 71 *Iowa L. Rev.* at 351; *RICO Prosecutions and Double Jeopardy, supra,* 78 *N.W.U. L. Rev.* at 1389. Thus, consistent with the holding of the Appellate Division, we conclude that *Vitale*

intended the second "prong" or test as an alternative to the first. Apart from the erroneous conclusion that the proof prong must be satisfied in addition to the elemental prong of double jeopardy, *Dively* accurately describes that second prong.

Relying on the statement in *Vitale, supra,* 447 *U.S.* at 417, 100 *S. Ct.* at ___, 65 *L.Ed.*2d at 236, that proof of the greater offense must necessarily establish the lesser offense, the *Dively* Court determined that the question in the second prong was whether the evidence actually used to establish guilt in the first prosecution is identical to that that will be used in the second prosecution. *Dively, supra,* 92 *N.J.* at 581. If the same evidence used in the first prosecution is the sole evidence in the second, the prosecution of the second offense is barred. *See State v. McGaughy,* 505 *So.*2d 399 (Ala. Crim. App. 1987) (substantial claim of double jeopardy if proof of lesser offense constitutes sole proof of element of greater offense); *State v. Grampus, supra,* 343 *S.E.*2d 26 (if traffic violation represents sole basis for element of felony DWI prosecution, double jeopardy bar applies); *see also Sekou v. Blackburn,* 796 *F.*2d 108, 109 (5th Cir. 1986) (felony murder not barred by armed robbery conviction as long as armed robbery need not be sole underlying felony for felony murder). *But see People v. Dickens,* 144 *Mich. App.* 49, 373 *N.W.*2d 241 (1985) (DWI charge barred because it was essential to proving negligence for homicide even though excessive speed also proven on question of negligence).

-III-

Death by auto requires proof of a death, a fact not required for the proof of drunk driving, *N.J.S.A.* 39:4-50. Drunk driving, on the other hand, requires proof of defendant's intoxication (or blood alcohol concentration), a fact not required for the proof of death by auto, *N.J.S.A.* 2C:11-5. Thus, under the traditional *Blockburger* analysis, drunk driving and death by auto are not the "same" of-

fense, and a conviction or acquittal for one should not bar a subsequent prosecution for another. *See State v. Calvacca, supra,* 199 *N.J. Super.* 434.

Because the *Blockburger* elemental test provides no bar in the present case, we must consider whether the second prosecution is barred because it will involve the same evidence as the first. The death-by-auto statute, *N.J.S.A.* 2C:11:5a, provides that "criminal homicide constitutes death by auto when it is caused by driving recklessly." Defendant contends, and the Appellate Division accepted, 208 *N.J. Super.* at 426, that the State's case depended solely on evidence of intoxication to prove recklessness. So viewed, the State in the second prosecution would be relying on the same proofs that constituted the sole evidence on the question of recklessness in the first. The prosecution for DWI, as the Appellate Division found, would, therefore, be barred. Before us, however, the State contends that evidence other than intoxication was offered to prove recklessness in the death-by-auto action. In this regard, the State points to the weather, road, and lighting conditions, as well as the absence of any skid marks, to create an inference of recklessness.

The parties have not provided us with the record of the death-by-auto trial, thereby precluding our independent examination of the proofs in that proceeding. As a result, it is necessary to remand the matter to the trial court to review the proofs of recklessness in the death-by-auto proceeding. If the State relied solely on intoxication as evidence of recklessness in the death-by-auto case, double jeopardy would bar the DWI prosecution. If, however, other evidence was adduced, the DWI prosecution will not be barred.

We find the same result follows under *Pandelli v. United States,* 635 *F.*2d 533 (6th Cir. 1980), which the State urges us to follow. In *Pandelli,* the Sixth Circuit found that *Vitale* had modified the *Blockburger* elemental test to make

less abstract the comparison of the elements of the two offenses. *Id.* at 536; *see also Davis v. Herring,* 800 *F.*2d 513, 519 (5th Cir. 1986) (when complex statute is charged, *Blockburger* test may be modified to require court to examine only relevant portion of statute); *Carter v. State,* ___ *Ind. App.* at ___, 424 *N.E.*2d 1047, 1050-51 (1981) (Staton, J., concurring) (court evolving from abstract analysis to *de facto* examination of components of statutory elements). The focus in *Pandelli* was an offenses with statutory elements that could be defined in the alternative or were capable of multiple possible meanings. The court explained its method of analysis not only by reference to *Vitale* but also to *Whalen v. United States,* 445 *U.S.* 684, 100 *S. Ct.* 1432, 63 *L.Ed.*2d 715 (1980), which involved cumulative punishments for rape and felony murder that arose out of the same episode. The felony murder statute involved was so written that any homicide perpetrated during the course of six specific felonies, one of which was rape, could support a conviction for felony murder. Under the traditional *Blockburger* analysis, the rape statute and the felony murder statute created distinct offenses because each statute required proof of an element that the other did not. In *Whalen,* however, the Court reasoned that it should construct from the alternative elements within the statute the particular formulation applicable to the case at hand, ridding the statute of alternatives that do not apply. Because rape was the only applicable felony, the Court found that rape was a lesser offense included in felony murder because all of the elements of rape were included within the elements required in a felony murder case based on rape. The *Pandelli* court adopted that method of analysis and concluded that when reviewing double jeopardy claims, before applying the *Blockburger* test, courts "must narrow the statute to be analyzed until it includes only the alternatives relevant to the case at hand." *Id.* at 538.

Similarly, "recklessness," an element of death by auto, is capable of many possible meanings including, as was the case in *Vitale,* failure to slow. In such a case, com-

paring the elements of the statutory offenses in their abstract form is virtually meaningless: a death-by-auto statute that requires recklessness will never specifically include failure to slow as a lesser included offense. The first step, according to the *Pandelli* court, is to redefine the elements of the offense in terms of the specific alternative or meaning applied by the prosecution. *Id.* at 538. A court considering double jeopardy would narrow the elements of the offense to include only the alternatives or meanings relevant to the particular case. After that narrowing process has been completed, the statutory elements, as narrowed, can be compared in accordance with *Blockburger. Id.; see* also Pryor v. *Rose,* 724 *F.*2d 525, 529 (6th Cir. 1984) (court must select relevant alternative from multiple-purpose criminal statute).

Traffic offenses, such as DWI, normally are prosecuted in the municipal court. *N.J.S.A.* 2A:8-21a. Municipal courts, however, have no jurisdiction to try death-by-auto cases. *N.J.S.A.* 2A:8-21g. As an indictable offense, death by auto is tried in the Superior Court. *N.J.S.A.* 2A:3-4, *R.* 3:1-5a. The Superior Court may assert jurisdiction over non-indictable offenses when they are lesser included offenses of the indictables. *State v. Saulnier,* 63 *N.J.* 199 (1973). The requirement that DWI be tried in the municipal court and death by auto in the Superior Court presents a jurisdictional dilemma. We undertook to solve that dilemma in *Dively* by "issuing a directive to all municipal court judges to withhold actions on drunk driving incidents involving personal injuries until clearance to proceed has been obtained from the county prosecutor. Where death occurs, we expect a drunk driver in the future to be charged with and tried for the greater offense of death by auto." 92 *N.J.* at 590. Various procedures have been suggested to solve the problem of the disposition of the death-by-auto charge, which may be tried before a jury and the DWI charge, as to which there is no right to trial by jury. By virtue of an annual cross-assignment order,

Superior Court judges may hear municipal court cases in the cases in which they sit. Hence, we believe that the appropriate solution is for both charges to proceed simultaneously. The judge will preside as a Superior Court judge over the trial of the death-by-auto action. The same judge will sit as a municipal court judge with respect to the DWI charge and base his or her decision on the proofs adduced in the course of the death-by-auto charge. If in the death-by-auto case the sole evidence of recklessness is defendant's intoxication, the jury's determination of that issue will preclude a conviction for the DWI charge.

The judgment of the Appellate Division is reversed, and the matter is remanded to the Law Division.

Chief Justice Wilentz and Justices Clifford, Handler, O'Hern, Garibaldi and Stein join in this opinion.

SUPREME COURT OF NEW JERSEY

No. A-89 September Term 1986

On appeal from _____
On certification to Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LINDA DE LUCA,

Defendant-Respondent.

Decided July 21, 1987
Chief Justice Wilentz Presiding
Opinion by Justice Pollock
Dissenting/Concurring opinion by _____

Checklist	Affirm	Reverse & Remand	Modify	Concur In Result
Chief Justice Wilentz		X		
Justice Clifford		X		
Justice Handler		X		
Justice Pollock		X		
Justice O'Hern		X		
Justice Garibaldi		X		
Justice Stein		X		
TOTALS		7		

APPENDIX B

Dover Township
Municipal Court

April 30, 1985

Wilbert & Montenagro, P.C.
ATTN: MICHAEL E. WILBERT, ESQ.
531 Burnt Tavern Road, Box 1049
Bricktown, New Jersey 08723

Gilmore & Monahan, P.C.
ATTN: RUSSELL P. CHERKOS, ESQ.
Nine Allen Street, Box 1540
Toms River, New Jersey 08754

RE: STATE v. DeLUCA
Summons Nos. X64301 and X64819

Dear Sirs:

The Defendant in the above-captioned matter was involved in a motor vehicle accident with a pedestrian who died as a result thereof. The Defendant received a motor vehicle summons for reckless driving *N.J.S.A.* 39:4-96 and one for driving while intoxicated *N.J.S.A.* 39:4-50. Prior to any disposition of the motor vehicle matters, the accident investigation was referred to the Ocean County Prosecutor. Subsequently, the Defendant was indicted for death by auto in violation of *N.J.S.A.* 2C:11-5. A trial by jury on that charge resulted in an acquittal. The motor vehicle matters were then referred back to the Dover Township Municipal Court for disposition. The Defendant had filed the within motion for dismissal of the motor vehicle charges based upon the theory of double jeopardy and relies upon *State v. Dively*, 92 N.J. 513 (1983) and the cases cited therein.

The State concedes that *Dively* controls the outcome of the motion as it relates to the reckless driving charge. It

is conceded that the reckless driving complaint is a lesser included charge of death by auto and, therefore, should be dismissed based upon double jeopardy. In *Dively,* the Court stated at page 580:

> The theory that when the greater offense includes the lesser, prosecution for either bars a subsequent prosecution for the other has been the settled law of this State.

It is clear that both *N.J.S.A.* 39:4-96 and *N.J.S.A.* 2C:11-5 address operation of a motor vehicle in heedless, willful, and wanton disregard of the safety of others as to endanger person or property, or cause the death of a person, respectively. Therefore, the motion of the Defendant to dismiss the complaint alleging a violation of *N.J.S.A.* 39:4-96 is granted.

The second motion seeks a dismissal of the driving while intoxicated charge upon the same theory of double jeopardy. It is important to note that *Dively* does not address the issue of double jeopardy as it relates to *N.J.S.A.* 39:4-50 even though the Defendant therein pleaded guilty to that charge and the reckless driving charge was merged into it. The *Dively* Court emphasized that the plea on the driving while intoxicated included the merged reckless driving and, therefore, there was a factual basis for the reckless driving for the purpose of the double jeopardy motion therein. *Dively,* at page 587. The Court confused the issue, however, at page 589:

> Administration of the law is not entrusted soley to the judiciary. The legislative and executive arms of the State have vital roles in that governmental function. Effective enforcement depends upon cooperation between municipal courts, municipal prosecutors, and county prosecutors. An effective, orderly procedure dictates the necessity of an arrangement whereby more serious

> crimes are tried in the court of plenary jurisdiction as intended, rather than disposed of in the municipal court for an infraction of a substantially minor nature. A "breakdown in communications between state and municipal officials forms no justification for depriving an accused of his right to plead double jeopardy." *Robinson v. Neil,* 366 F. Supp. 924, 929 (E.D.Tenn. 1973). Accordingly, it is necessary that there be effective cooperation between the municipal courts and the county prosecutor. We have no doubt that such cooperation will be forthcoming. We have heretofore directed that where a complaint is filed in the municipal court and the magistrate has a reason to believe that the factual situation out of which the complaint arose may also involve an indictable offense, the matter should be referred to the county prosecutor. Municipal Court Bulletin Letter #96, February 20, 1964. We propose to bring this directive again to the attention of all municipal court judges. In addition, we are issuing a directive to all municipal court judges to withhold actions on drunk driving incidents involving personal injuries until clearance to proceed has been obtained from the county prosecutor. *Where death occurs, we expect a drunk driver in the future to be charged with and tried for the greater offense of death by auto.* (emphasis added)

This is confusing, not in the sense that the county prosecutor should proceed first, but, rather, it implies that driving while intoxicated is a lesser included offense of death by auto when the court never addressed that issue at all.

The Defendant's double jeopardy argument herein as it relates to *N.J.S.A.* 39:4-50 and *N.J.S.A.* 2C:11-5 is that the County Prosecutor's entire case for death by auto was

that the Defendant was intoxicated at the time of operation and, therefore, recklessly operated a motor vehicle in willful and wanton disregard of the safety of others. Defendant also argues that the "additional risk" provision of *N.J.S.A.* 2C:11-5 makes the offense similar to *N.J.S.A.* 39:4-50. That "additional risk" provision provides:

> ". . . (N)otwithstanding the provisions of 2C:43-w, the court may not suspend the imposition of sentence on any defendant convicted under this section who was operating the vehicle under the influence of an intoxicating liquor . . . and any sentence imposed under this section shall include a fixed minimum term of 120 days imprisonment during which the defendant shall be ineligible for parole or a requirement that the defendant perform a community related service for a minimum of 120 days.

Applying the two prong test outlined in *Dively* the Defendant states at page 5 and 6 of her brief:

> Thus the elements of 2C:11-5 require (1) death, (2) due to operation of a motor vehicle, (3) where driver was under the influence of an intoxicating liquor. As is readily apparent, a conviction under N.J.S.A. 39:4-50 require (1) operation of a motor vehicle, (2) where the driver is under the influence of an intoxicant. As with the reckless driving charge, the only additional element required for death by automobile, is death. Thus, there is no additional element contained in a driving while intoxicated charge that is not contained in the "additional risk" provision of the death by auto statute. The second analysis under *Dively* requires that the same evidence be used to prove both offenses. Obviously, since these two charges sprang from the same event, the same evidence

> will be used. This will include the operation of the vehicle by the defendant on the night in question, the subsequent breathalyzer test and other physical tests used to build a prima facia case of intoxication. *Indeed the prosecutor produced evidence that the only element of recklessness charged in the indictment was the operation of the vehicle while under the influence.* (emp. added)

This reasoning is defective in that *N.J.S.A.* 2C:11-5 requires reckless operation in willful and wanton disregard of the safety of others, not operation under the influence of intoxicating liquor. There is no offense of death by driving while under the influence of alcohol. The County Prosecutor's case against the Defendant was surely doomed, even if the Defendant had been convicted because of the clear distinction between reckless driving and driving while intoxicated. In *State v. Roenicke,* 174 N.J. Super 513 (Law Div 1980) the Court held that reckless driving is not a lesser included offense of driving while intoxicated.

> N.J.S.A. 39:4-50 requires proof that an individual was operating a motor vehicle, whether or not on a highway, while his ability to do so was deleteriously affected by alcohol. The essence of the offense *is the impaired condition of defendant's* physical coordination or mental faculties rather than the manner in which he is driving. Indeed, the vehicle need not actually be moving for one to be convicted. Compare *State v. Sweeney,* 40 N.J. 359 (1963) with *State v. Daly,* 64 N.J. 122 (1973).
>
> On the other hand, reckless driving necessitates the driving of a vehicle on a highway "heedlessly, in willful or wanton disregard of the rights and safety of others, in a manner so as to endanger, or to be likeley to endanger a person or property . . ." The essence of N.J.S.A. 39:4-96 is grossly

> improper operation of a vehicle which threatens others. *State v. Francis,* 67 N.J. Super. 377, 382 (App.Div.1961). While reckless driving may be a factor in determining whether one is driving under the influence, it is not a necessary ingredient. See *State v. Jahn,* supra, 121 N.J. Super. at 212; cf. N.J.S.A. 2C:1-8(d)(1). Thus, reckless driving is not a lesser included offense of a drunk driving charge. *Roenicke* at 517-518

The County Prosecutor's case for death by auto based exclusively upon intoxication was destined to fail because of this distinction. The essence of *N.J.S.A.* 2C:11-5 is "grossly improper operation of a motor vehicle" which results in the death of another. The "additional risk" provision of *N.J.S.A.* 2C:11-5 relates to sentencing and is not a substantive offense in and of itself. A Defendant could not have been found not guilty of death by auto caused by reckless driving and guilty of death by driving while under the influence. In comparing the offenses, *N.J.S.A.* 2C:11-5 requires proof of reckless driving while the reckless operation is not an element of *N.J.S.A.* 39:4-50, but rather, operation of a motor vehicle with a blood alcohol content of .10 or above. The distinction between reckless driving *N.J.S.A.* 39:4-96 and *N.J.S.A.* 39:4-50 as outlined in *Roenicke* are applicable to death by auto, i.e. *N.J.S.A.* 2C:11-5 and *N.J.S.A.* 39:4-50 as well. The "additional risk" provisions, as previously mentioned above, are for sentencing purposes and do not establish a separate substantive offense. Defendant is being tried in the municipal court on the same facts but not on the same charges.

For the reasons outlined above, the Defendant's motion to dismiss *N.J.S.A.* 39:4-50 on the theory of double jeopardy is denied as it does not constitute a lesser included offense of *N.J.S.A.* 2C:11-5. I will direct the Court clerk to schedule the within matter for trial.

Respectfully submitted,

/s/ Steven Russo
STEVEN P. RUSSO, J.M.C.

Dated: April 30, 1985

SPR:asp
cc Clerk, Dover Twp. Municipal Court

APPENDIX C

Superior Court of New Jersey

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

August 1, 1985

Christopher J. LaMonica, Esq.
WILBERT & MONTENEGRO, P.A.
Post Office Box 1049
Brick Town, NJ 08723

Patrick J. Sheehan, Assistant Prosecutor
OCEAN COUNTY PROSECUTOR'S OFFICE
Ocean County Court House
Toms River, NJ 08753

RE: STATE OF NEW JERSEY vs. LINDA DE LUCA
Appeal No. 93-85

Gentlemen:

In deciding the motion for dismissal based on double jeopardy grounds, the Court has considered all of the memoranda submitted by the Prosecutor and defense counsel and, in addition thereto, has spoken personally with Assistant Prosecutor Edward Oles, who prosecuted the death by auto case before Judge Addison. Mr. Oles has confirmed that the prosecution's proofs that went to the element of recklessness were limited solely to those matters dealing with the defendant's intoxication. Applying what was said in the *Dively* case, and noting what the Court said in the case of *State v. Calvacca*, a recently decided Appellate Division case, the Court is satisfied that to require the defendant to face trial on the N.J.S.A. 39:4-50 charge in the Municipal Court would constitute double jeopardy. Ac-

cordingly, the motion to dismiss the complaint based upon the grounds of double jeopardy is hereby granted.

Defense counsel should submit an appropriate form of Order.

Very truly yours,

/s/ Peter J. Giovine
PETER J. GIOVINE, J.S.C.

PJG:11c

cc: Steven P. Russo, J.M.C.
Prosecutor, Dover Township Municipal Court

APPENDIX D

WILBERT, & MONTENEGRO, P.A.
A PROFESSIONAL CORPORATION
531 Burnt Tavern Road
P.O. Box 1049
Brick Township, New Jersey 08723
(201) 295-4500
Attorneys for Defendant

Plaintif

STAT OF NEW JERSEY,

vs.

Defend

I DA DELUCA,

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
OCEAN COUNTY
INDICTMENT NO. 241 4 84
DOVER TOWNSHIP MU-
NICIPAL COURT
SUMMONS NO.: 64819

APPEAL NO. 93-85

CRIMINAL ACTION

ORDER TO DISMISS
SUMMONS NO. 64819

This atter having been opened to the Court by Wilbert and M enegro, P.A., attorneys for the defendant, Linda DeLuc for an Order to Dismiss Summons No. 64819 in the Do Township Municipal Court and the Court having consid d the moving papers and the opposition submitted by Ed d J. Turnbach, Esq., Prosecutor, Ocean County; and fo ood cause shown;

It is this 13th day of August, 1985,

ORI RED that the request of defendant, Linda De-Luca, dismiss the summons pending in the Dover Township M icipal Court bearing No. 64819 is hereby granted.

/s/ Peter J. Giovine
PETER J. GIOVINE, J.S.C.

FILED

AUGUST 14, 1985

M. DEAN HAINES, CLERK
COUNTY OF OCEAN

APPENDIX E

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5781-84T5

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LINDA DELUCA,

Defendant-Respondent.

Argued January 28, 1986—Decided March 6, 1986

Before Judges Michels, Gaulkin and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County.

Mark J. Cassidy, Assistant Ocean County Prosecutor, argued the cause for appellant (Edward J. Turnbach, Ocean County Prosecutor, attorney; Mr. Cassidy, of counsel and on the brief).

Christopher J. LaMonica argued the cause for respondent (Wilbert & Montenegro, attorneys; Mr. LaMonica, of counsel and on the brief).

The opinion of the court was delivered by

MICHELS, P.J.A.D.

Plaintiff State of New Jersey (State) appeals from a judgment of the Law Division that dismissed a Dover Township Municipal Court complaint charging defendant Linda DeLuca (defendant) with operating a motor vehicle

while under the influence of alcohol, a violation of *N.J.S.A.* 39:4-50. Judge Giovine, in the Law Division, held that requiring defendant to face trial on the driving while under the influence of intoxicating liquor charge (*N.J.S.A.* 39:4-50) would constitute double jeopardy, in light of her prior acquittal on a death by auto charge (*N.J.S.A.* 2C:11-5), which arose from the same incident. We agree and affirm.

As a result of a fatal motor vehicle accident involving a pedestrian which occurred on January 29, 1984, defendant was issued two summonses by the Dover Township Police Department. One summons charged defendant with operating a motor vehicle while under the influence of alcohol, in violation of *N.J.S.A.* 39:4-50. The other charged her with reckless driving, in violation of *N.J.S.A.* 39:4-96. In addition, subsequently, on April 4, 1984, the Ocean County Grand Jury indicted defendant and charged her with death by auto, in violation of *N.J.S.A.* 2C:11-5. Defendant was first tried on the death by auto charge in the Law Division, where she was acquitted by a jury.

Following this acquittal, prosecution was commenced in the Dover Township Municipal Court, where the driving while intoxicated and reckless driving charges had been stayed pending the outcome of the trial on the indictable offense. Defendant moved before the municipal court to dismiss both charges, alleging that prosecution under *N.J.S.A.* 39:4-50 (driving while intoxicated) and *N.J.S.A.* 39:4-96 (reckless driving) would be violative of the double jeopardy clauses of both the Federal and State Constitutions. Although the State conceded that double jeopardy barred prosecution of the reckless driving charge, it argued that it did not bar prosecution of the driving while intoxicated charge. The municipal court agreed and granted defendant's motion to dismiss the reckless driving charge. However, it denied her motion to dismiss the driving while intoxicated charge, concluding that there was no double jeopardy violation since operating a motor vehicle while

under the influence of alcohol did not constitute a lesser included offense of death by auto.

Pursuant to leave granted by the Law Division, defendant thereafter appealed the municipal court determination on the ground of double jeopardy. After hearing oral arguments, but before reaching his decision on the double jeopardy issue, the Law Division judge spoke with the assistant prosecutor who had presented the prior death by auto case to the jury. The assistant prosecutor confirmed, as defendant had asserted, that the proofs in the death by auto case went to the element of recklessness and were limited solely to matters dealing with defendant's intoxication. The Law Division judge thereupon granted defendant's motion and dismissed the driving while intoxicated charge, finding that prosecution of the charge would constitute double jeopardy, in light of defendant's acquittal for death by auto. The State appealed.

On appeal the State contends that the Law Division judge erred in dismissing the driving while intoxicated charge since the prosecution of that offense was not barred by principles of double jeopardy. The constitutional principles, upon which the State relies, are found within the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution which provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life and limb. . . ." *U.S. Const.*, Amend. V. The Constitution of this State contains a narrower double jeopardy proscription which provides that "[n]o person shall, after acquittal, be tried for the same offense." *N.J. Const.* (1947), Art. I, par. 11. These constitutional provisions have been construed to be coextensive in application. *State v. Dively*, 92 *N.J.* 573, 578 (1983); *State v. Barnes*, 84 *N.J.* 362, 370 (1980); *State v. Rechtschaffer*, 70 *N.J.* 395, 404 (1976). Such a construction is compelled, at least in part, because the Fifth Amendment proscription of double jeopardy has been held enforceable against the states by virtue of the Fourteenth Amendment. *Benton v. Maryland*, 395

U.S. 784, 794, 89 *S. Ct.* 2056, 23 *L. Ed.* 2d 707, 716 (1969).

In considering the scope of the Double Jeopardy Clause, the United States Supreme Court has set forth three separate constitutional protections found to be embodied within:

> [*The clause*] *protects against a second prosecution for the same offense after acquittal.* It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. [*North Carolina v. Pearce*, 395 *U.S.* 711, 717, 89 *S. Ct.* 2072, 23 *L. Ed.* 656, 664-665 (1969) (Emphasis supplied and footnotes omitted)].

It is, of course, the first protection listed above which is most relevant to the issue raised by the State on this appeal. However, whatever the sequence of the various prosecutions may be, the Fifth Amendment forbids successive prosecution where principles of double jeopardy are applicable. *See Brown v. Ohio*, 432 *U.S.* 161, 169, 97 *S. Ct.* 2221, 53 *L. Ed.* 2d 187, 196 (1977).

The Double Jeopardy Clause ensures that "the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .' " *State v. Barnes, supra*, 84 *N.J.* at 370 (citing *Green v. United States*, 355 *U.S.* 184, 187-188, 78 *S. Ct.* 221, 223, 2 *L. Ed.* 2d 199, 204 (1957)). Accordingly, it is clear that "[a] State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green v. United States, supra*, 355 *U.S.* at 187, 78 *S. Ct.* at 223, 2 *L. Ed.* 2d at 204.

Although there can be no doubt of the value of such a constitutional safeguard against multiple prosecutions,

courts have long wrestled with the difficulty of determining when they are confronted with "the same offense", as contemplated by the Double Jeopardy Clause.

> The significance of the term "same offense" is not limited to the same offense as an entity and designated as such by legal name, but it comprehends any integral part of such offense which may subject the offender to indictment and punishment. (citation omitted). *Where a lesser offense is a necessary ingredient or component part of the principal or greater offense and grows out of the same transaction, conviction or acquittal of the lesser bars further prosecution for the greater crime.* [*State v. Williams*, 30 *N.J.* 105, 114 (1959) (Emphasis supplied)].

See also State v. Wolf, 46 *N.J.* 301, 303 (1966).

In *State v. Currie*, 41 *N.J.* 531, 537-539 (1964), the New Jersey Supreme Court set forth the "same transaction", "same evidence" and "included offense" tests, along with supporting case law, in an effort to show the futility of adopting a single legal test to be applied in double jeopardy analysis. *See also State v. Davis*, 68 *N.J.* 69, 81 (1975) (while a distinct standard for determining the existence of same offenses would be desirable, court recognized probable futility of this goal). *Cf. State v. Gregory*, 66 *N.J.* 510, 517 (1975) (narrow and mechanical application of traditional tests could result in harassment of defendant or frustration of the State's goals of bringing guilty to justice). Instead, the *Currie* Court concluded:

> In applying the prohibition against double jeopardy, the emphasis should be on underlying policies rather than technisms. The primary considerations should be fairness and fulfillment of reasonable expectations in the light of the con-

> stitutional and common law goals. [41 *N.J.* at 539].

See also State v. Rechtschaffer, supra, 70 *N.J.* at 405 ("manifest necessity" and "the ends of public justice" are the guidelines and goals under the circumstances of each case); *State in Interest of S.Z. and M.C.*, 177 *N.J. Super.* 32, 36 (App. Div. 1981) ("Fairness and reasonable expectation in light of constitutional and common law goals should control, not technicalities.")

Each case, therefore, must be considered in light of its own particular facts and circumstances, in order that a court may determine whether a bar of double jeopardy should be applied. Here, the critical question is whether the motor vehicle infraction of driving while intoxicated, in violation of *N.J.S.A.* 39:4-50, is the "same offense", for double jeopardy purposes, as the criminal charge of death by auto, a violation of *N.J.S.A.* 2C:11-5. Initially, it must be noted that, at present, it is clear that principles of double jeopardy are applicable to both motor vehicle and criminal offenses. *State v. Dively, supra*, 92 *N.J.* at 586. *See also State v. Calvacca*, 199 *N.J. Super.* 434, 438 (App. Div. 1985); *State v. Tropea*, 78 *N.J.* 309, 314-316 (1978); *State v. Lanish*, 103 *N.J. Super.* 441, 444 (App. Div. 1968), aff'd o.b., 54 *N.J.* 93 (1969). *Cf. State v. Laird*, 25 *N.J.* 298, 302-303 (1957). This has not always been the case, however, since prior case law, now disapproved, drew a sharp distinction between crimes and motor vehicle laws, for purposes of double jeopardy analysis. *See, e.g., State v. Shoopman*, 20 *N.J. Super.* 354, 358-359 (App. Div. 1952), aff'd, 11 *N.J.* 333 (1953) (prosecution for violation of Motor Vehicle Act and prosecution for violation of Crimes Act not violative of double jeopardy); *State v. Van Landuyt*, 157 *N.J. Super.* 469, 475 (App. Div. 1978) (principles of double jeopardy not offended where defendant previously convicted of Motor Vehicle Act violation is indicted for violation of criminal law).

In light of the New Jersey Supreme Court's express approval of the application of double jeopardy principles to criminal charges and motor vehicle infractions alike, *State v. Dively, supra,* 92 *N.J.* at 586, we must first determine whether the two relevant violations in the within matter may be properly considered as the "same offense" for analysis purposes. Defendant has already been acquitted of the criminal charge of death by auto in violation of *N.J.S.A.* 2C:11-5. This statute provides, in pertinent part, that "[c]riminal homicide constitutes death by auto when it is caused by driving *recklessly.*" (Emphasis supplied).

The term "recklessly", as used within this statute, is defined in *N.J.S.A.* 2C:2-2:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. [*N.J.S.A.* 2C:2-2b(3)].

Accordingly, the three following essential elements must be proven beyond a reasonable doubt to find a defendant guilty of death by auto: "(1) That defendant was driving a vehicle; (2) That defendant caused the death of [a victim]; and (3) That defendant caused such death by driving the vehicle recklessly." *Proposed Model Jury Charge,* Death By Auto, *N.J.S.A.* 2C:11-5 (Revised March 5, 1984).

On the other hand, "[a] person who operates a motor vehicle while under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the

defendant's blood" may be found guilty of the motor vehicle infraction of driving while intoxicated. *N.J.S.A.* 39:4-50(a). This violation requires proof that an individual was operating a motor vehicle while her "physical coordination or mental faculties [were] deleteriously affected" by alcohol. *State v. Emery*, 27 *N.J.* 348, 355 (1958). *See also State v. Johnson*, 42 *N.J.* 146, 169 (1964). The essence of the offense of driving while intoxicated, therefore, is the impaired condition of defendant's physical coordination or mental faculties, rather than the manner in which she is driving. Consequently, while recklessness or reckless driving may be one relevant factor in determining whether an individual is driving while intoxicated, it is not a necessary ingredient.

In *Illinois v. Vitale*, 447 *U.S.* 410, 411, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d 228, 232 (1980), the United States Supreme Court considered whether the Double Jeopardy Clause of the Fifth Amendment would prohibit the prosecution of the greater offense of involuntary manslaughter where there had been a previous conviction for a lesser offense of failing to reduce speed. In determining whether these two charges constituted the "same offense" for double jeopardy purposes, the *Vitale* court first acknowledged that the "principal test" was established in *Blockburger v. United States*, 284 *U.S* 299, 52 *S. Ct.* 180, 76 *L. Ed.* 306 (1932) and had been restated in *Brown v. Ohio*, 432 *U.S.* 161, 97 *S. Ct.* 2221, 53 *L. Ed.* 187 (1977). Under this test:

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. [*Blockburger v. United States, supra*, 284 *U.S.* at 304, 52 *S. Ct.* 180, 76 *L. Ed.* at 309]

The *Blockburger* test is, therefore, elemental or statutory in nature since it "focuses on the *proof necessary to prove the statutory elements of each offense,* rather than on the actual evidence to be presented at trial." *Illinois v. Vitale, supra,* 447 *U.S.* at 416, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 235 (Emphasis supplied). Thus, if each statutory violation requires proof of a fact that the other does not, the *Blockburger* test is satisfied.

The Supreme Court did not, however, rest its decision in *Illinois v. Vitale,* solely upon the elemental or statutory double jeopardy test of *Blockburger.* Instead, the Court concluded that it would be important to determine exactly what evidence the State of Illinois would rely upon in its prosecution of the second offense. *Illinois v. Vitale, supra,* 447 *U.S.* at 420-421, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 238. In reaching this conclusion, the *Vitale* Court relied on the double jeopardy analysis which had been set forth in its earlier decision in *Brown v. Ohio, supra.*

The *Brown* Court had found that a second prosecution for the greater crime of auto theft was barred by an earlier conviction for joyriding, a lesser crime, by operation of the Double Jeopardy Clause and the Fourteenth Amendment. In reaching this decision, the Court specifically noted:

> The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; [and] *the prosecutor who has established auto theft necessarily has established joyriding as well.* [432 *U.S.* at 167-168, 97 *S. Ct.* 2221, 53 *L. Ed.* 2d at 195 (Emphasis supplied)].

The emphasized language set forth in the above citation was considered to be essential to the *Brown* holding. *Illinois v. Vitale, supra,* 447 *U.S.* at 417, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 236. Writing for the Court in *Vitale,* Justice White explained:

> Had the State been able to prove auto theft, without also proving that the defendant took, operated, or kept the auto without the consent of the owner—*if proof of the auto theft had not necessarily involved proof of joyriding*—the successive prosecutions would not have been for the "same offense" within the meaning of the Double Jeopardy Clause. [*Ibid.* (Emphasis supplied)].

In emphasizing these evidential factors, the *Vitale* Court apparently established a second set of criteria which must be considered integral to double jeopardy analysis. Such evidential analysis must, however, be based upon more than the "mere possibility" that the State will rely on the same ingredients in two separate prosecutions. *Illinois v. Vitale, supra,* 447 *U.S.* at 419, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 237. Furthermore, in writing for the *Vitale* Court, Justice White noted that if the same evidence were to be presented in a subsequent prosecution, a defendant "would have a *substantial claim of double jeopardy* under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* at 421, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 238 (Emphasis supplied).

The Supreme Court of New Jersey has recently applied the double jeopardy analysis, as refined in *Illinois v. Vitale, supra,* in *State v. Dively,* 92 *N.J.* 573 (1983), which involved dual prosecutions for driving while intoxicated and death by auto. Defendant in *Dively* had been issued municpal court summonses for: (1) drunk driving, in violation of *N.J.S.A.* 39:4-50; (2) driving without a license, in violation of *N.J.S.A.* 39:3-10; (3) reckless driving, in violation of *N.J.S.A.* 39:4-96; (4) failure to keep right, in violation of *N.J.S.A.* 39:4-82; and (5) driving after license revocation, in violation of *N.J.S.A.* 39:3-40. The municipal court judge later merged the charges for reckless driving and failure to keep right into the drunk driving charge, finding that the two former charges were acts of a lesser

nature which were included within the drunk driving charge. Defendant then pleaded guilty to the three remaining charges and was sentenced accordingly.

After sentence was imposed, defendant was indicted for causing death by auto, then a violation of *N.J.S.A.* 2A:113-9, as a result of the same accident which was the subject of the municipal court complaints. Relying on *Illinois v. Vitale, supra*, defendant moved for dismissal of this indictment on the ground of double jeopardy. Despite the prosecutor's concession that the "same evidence that would have been offered on the complaints in the municipal court would have been used to prove defendant's guilt of death by auto," the motion was denied and an appeal followed. In considering the merits of defendant's double jeopardy argument, the *Dively* Court relied heavily upon the analysis set forth in *Illinois v. Vitale, supra*, noting that the United States Supreme Court had there "meticulously [drawn] attention to the proposition that not only must the lesser-included offense require no proof beyond that required in the greater offense, but also the proof of the greater offense must establish the lesser offense." 92 *N.J.* at 581 (citing *Illinois v. Vitale, supra*, 447 *U.S.* at 417, 100 *S. Ct.* at 2266, 65 *L. Ed.* 2d at 236). Thus, according to *Dively*, it is only when both prongs of the analysis are satisfied that double jeopardy may bar a subsequent prosecution. 92 *N.J.* at 581.

In *Dively*, the Supreme Court's evaluation of the statutory elements of the motor vehicle offense of reckless driving and the crime of death by auto, as well as its evaluation of the evidence used to prove (or to be used to prove) these elements, led to its conclusion that defendant's municipal court conviction for reckless driving was a lesser included offense of death by auto. With respect to the statutory elements, each statute required proof that defendant drove "heedlessly, in wilful [sic] or wanton disregard of the safety of others." 92 *N.J.* at 582. Death by auto required only this showing, plus evidence of the

death of a victim. Thus, since there was no element required for proof of the motor vehicle violation which was not also required to prove the indictable offense, on this prong of the analysis, the *Dively* defendant prevailed. The evidential analysis to satisfy the second prong was even simpler, since the prosecutor had conceded that the state would rely on the same evidence offered on the complaints in municipal court to prove defendant's guilt of death by auto. Since both prongs of the analysis were satisfied, defendant in *Dively* prevailed on double jeopardy grounds.

Application of the two prong analysis is not as simple here as it was in *Dively*, however, since in this case defendant was indicted and acquitted of the crime of death by auto and also charged with the motor vehicle offense of driving while intoxicated. With respect to the first prong's statutory or elemental analysis, driving while intoxicated is not a lesser included offense of death by auto, since the criminal violation requires recklessness and not drunkenness. Each charge, therefore, requires proof of an additional fact which the other does not. *See Blockburger v. United States, supra*, 284 *U.S.* at 304, 52 *S. Ct.* 180, 76 *L. Ed.* at 309. A violation of *N.J.S.A.* 39:4-50 necessitates a showing that an individual was intoxicated and his abilities were impaired due to the ingestion of alcoholic beverage. However, a statutory violation of *N.J.S.A.* 2C:11-5 does not require proof of intoxication. *State v. Casele*, 198 *N.J. Super.* 462, 472 (App. Div. 1985). Conversely, proof of death by auto necessitates a showing that a victim has died, while no such requirement is contained within *N.J.S.A.* 39:4-50. Consequently, here the *Blockburger* test would not operate to bar a second prosecution.

However, in light of *Illinois v. Vitale*, the actual evidence in the matter now under review must be examined in an effort to ascertain if the first prosecuted greater offense was based on proofs which would have established the lesser offense. *Illinois v. Vitale, supra*, 447 *U.S.* at 420-421, 100 *S. Ct.* 2260, 65 *L. Ed.* 2d at 238. If the

evidence is the same, defendant would have a "substantial claim" of double jeopardy even if the two offenses are not "the same" under the *Blockburger* test. *Ibid.* Although proof of the recklessness element of death by auto does not always involve evidence of driving while under the influence of intoxicating liquor, here the assistant prosecutor, who tried the prior death by auto case, conceded that the State's "proofs that went to the element of recklessness were limited solely to those matters dealing with defendant's intoxication." Accordingly, since the evidence to be presented in the drunken driving prosecution of this defendant would involve the same proofs that were presented to establish the prior offense of death by auto, defendant has a "substantial" double jeopardy claim under *Vitale*.

Although there is some troublesome language in the *Dively* decision which suggests that a defendant must prevail on both elemental and evidential analyses in order to prevail on double jeopardy grounds, *see* 92 *N.J.* at 581 ("It is only when both prongs are met that double jeopardy applies."), this general statement must be considered in light of other pronouncements set forth within the opinion. For example, the *Dively* Court specifically noted that there may be double jeopardy evidential analyses in which proof of drunkenness is the sole evidence that a defendant drove recklessly:

> Driving while drunk does not necessarily translate into reckless driving. It is possible that a vehicle operated by an inebriated driver is not driven recklessly and obviously there are drivers who are reckless but not drunk. [92 *N.J.* at 583 n. 7].

By including this footnote in the text, the *Dively* Court impliedly acknowledged that there might be cases, such as this, in which recklessness and drunkenness would be deemed equivalent. In such situations, "despite the [S]tate's

likely victory over the defendant on the first prong, the *Dively* court apparently harbor[ed] some concern that some defendants may prevail on the double jeopardy claim by virtue of the evidential analysis and the *Vitale* reservation." Etzweiler, *The Dively Dilemma*, 8 Crim. Just. Q. 76, 85 (1983). Therefore, in the *Dively* opinion itself we find an indication of an implied exception to the Court's own general assertion that both elemental and evidential analyses must be met before double jeopardy applies.

In addition, in addressing the administrative problems which occur when complaints filed in municipal court involve factual situations out of which indictable offenses may also arise, the *Dively* Court stated:

> [W]e are issuing a directive to all municipal court judges to withhold actions on drunk driving incidents involving personal injuries until clearance to proceed has been obtained from the county prosecutor. *Where death occurs, we expect a drunk driver in the future to be charged with and tried for the greater offense of death by auto.* [92 *N.J.* at 590 (Emphasis supplied)].

Implicit in this statement is the understanding that, if the initial prosecution is for death by auto, a subsequent prosecution for drunk driving could be barred on double jeopardy grounds.

The conclusion that defendant here should be barred from a subsequent prosecution for driving while intoxicated, due to her prior acquittal on death by auto charges, is consistent with the analysis made by this court in *State v. Calvacca*, 199 *N.J. Super.* 434 (App. Div. 1985). In *Calvacca*, we considered whether a defendant's conviction and sentence for drunk driving infringed on his constitutional protection against double jeopardy where the prosecution for this motor vehicle offense followed a conviction for causing death by auto. Writing for the court in *Calvacca*,

Judge Furman set forth the *Vitale* analysis for double jeopardy, which was approved in *Dively*, noting:

> *Double jeopardy applies* not only to dual prosecutions for the same offense but also *to prosecutions for a lesser offense after conviction or acquittal of a greater offense* and to prosecutions for a greater offense after conviction or acquittal of a lesser offense. *Double jeopardy is a bar if the lesser offense requires no proof beyond that required to prove the greater offense and proof of the greater offense establishes the lesser offense.* Double jeopardy is not a bar if each offense requires proof of an additional fact which the other does not require. [199 *N.J. Super.* at 439 (Emphasis supplied)].

Applying this analysis, *Calvacca* rejected defendant's double jeopardy argument. At the time of defendant's accident, the death by auto statute, *N.J.S.A.* 2C:11-5, proscribed as criminal homicide causing death by driving a motor vehicle "carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others." Therefore, proof of defendant's drunkenness alone was considered insufficient to establish defendant's guilt of death by auto since it "was evidential only as to the element of wantonness." 199 *N.J. Super.* at 439. We, therefore, concluded that "a jury verdict of guilty [for death by auto] could have been reached and would have been sustainable solely on the proof that defendant was driving on the wrong side of [the road], irrespective of his drunken condition." *Ibid.*

Here, however, the identical nature of the proofs to be presented in the prosecution of the driving while intoxicated charge (*N.J.S.A.* 39:4-50) and the absence of a special verdict in the prior trial on the death by auto charge (*N.J.S.A.* 2C:11-5), which would indicate the jury's specific finding as to defendant's intoxication, compel the conclu-

sion that principles of double jeopardy bar the further prosecution of defendant for driving while intoxicated.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin Clerk

APPENDIX F

A-5781-84T5

ORDER ON MOTIONS/PETITIONS

STATE OF NEW JERSEY

vs.

LINDA DELUCA

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5781-84T5
MOTION NO. M-3077-85
BEFORE PART D

JUDGES: MICHELS, GAULKIN & STERN

FILED

APPELLATE DIVISION

APR 2 1986

Elizabeth McLaughlin
Clerk

MOVING PAPERS FILED MARCH 24, 1986
ANSWERING PAPERS FILED _____
DATE SUBMITTED TO COURT MARCH 31, 1986
DATE ARGUED _____
DATE DECIDED MARCH 31, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/FOR RECONSIDERATION		X	

SUPPLEMENTAL:

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

FOR THE COURT:

/s/ HERMAN D. MICHELS, P.J.A.D.
HERMAN D. MICHELS, P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 31st DAY OF MARCH 1986.

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION